BEFORE THE
UNITED STATES JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

In re Gerber Probiotic Products Marketing and Sales Practices Litigation	MDL No. _____

BRIEF IN SUPPORT OF PLAINTIFF RYAN BURN'S MOTION FOR TRANSFER OF ACTIONS TO THE EASTERN DISTRICT OF WASHINGTON PURSUANT TO 28 U.S.C. § 1407 FOR CONSOLIDATION AND PRETRIAL PROCEEDINGS

[Document filed electronically]

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INTRODUCTION

On February 29, 2012, Washington citizen Ryan Burns filed a putative class action in the Eastern District of Washington alleging that Nestle USA, Inc. and Gerber Products Company misleadingly advertise and market infant formulas and cereals as promoting immunity, digestive health, and visual and cognitive function because they contain probiotics, prebiotics and Omega-3 fatty acids. Nine additional actions have been filed in five other districts with nearly identical allegations. *See* Schedule of Actions. These ten actions, and the tag-alongs that are likely to arise in the near future, fit the statutory prerequisites for centralization: they involve common questions of fact, and centralization will further the convenience of parties and witnesses and promote the just and efficient conduct of the litigation. 28 U.S.C. § 1407(a).

In addition, consolidation will mitigate the possibility of inconsistent rulings including the certification of potentially overlapping plaintiff classes. Consolidation will also provide a single forum in which future tag-along actions may be transferred to streamline proceedings and promote judicial economy. *See* Rules 1.1(h), 7.1 and 7.2, R.P.J.P.M.L.

The Current Litigation

The ten actions for which Movant seeks centralization were all filed between February 10 and April 24, 2012. Accordingly, they are in their nascent stages: Defendants have not yet responded in any action. All ten actions contain effectively identical allegations: that Plaintiffs purchased at least one of five Gerber and Nestle products[1] relying on misleading advertisements touting the benefits of probiotics, prebiotics, and the Omega-3 fatty acids, docosahexaenoic acid (DHA) and arachidonic acid (AHA). Each action is also a putative class action, with each

[1] (1) Gerber DHA & Probiotic Single Grain Cereal; (2) Good Start Gentle Formula; (3) Good Start Protect Infant Formula; (4) Good Start 2 Gentle Formula; and (5) Good Start 2 Protect Formula (collectively the "Probiotic Products").

alleging effectively identical nationwide classes and alternative multi-state or single-state classes. *See* (in order of filing) Siddiqi Compl. ¶ 42; Thomas Compl. ¶ 42; Alvarez Compl. ¶¶ 37-39; Hawkins Compl. ¶¶ 36-38; Dourdoulakis Compl. ¶¶ 47-48; Walker Compl. ¶ 88; Burns Compl. ¶¶ 36-38; Gray Complaint ¶ 43; Ginger Complaint ¶42. In essence, the same case is now pending before five federal courts:

- Eastern District of Washington (*Burns*)
- Southern District of California (*Hawkins*)
- Northern District of California (*Alvarez, Gray*)
- Eastern District of California (*Ginger*)
- District of New Jersey (*Siddiqi*,[2] *Rudich, Thomas, Dourdoulakis, Walker*,[3])

Other than *Rudich* and *Walker*, which do not name Nestle, each case names Michigan company Gerber Products Company (with offices in New Jersey) and California company Nestle USA, Inc. as defendants. In addition, while there is some variation in the causes of action alleged by each plaintiff, there is also substantial overlap:

- California Consumer Legal Remedies Act (*Siddiqi, Thomas, Alvarez, Hawkins, Burns, Gray, Ginger*)
- California Unfair Competition Law (*Siddiqi, Thomas, Alvarez, Hawkins, Burns, Gray, Ginger*)
- Michigan Consumer Protection Act (*Alvarez, Hawkins, Burns, Gray, Ginger*)
- Washington Deceptive Trade Practices Law (*Burns*)

[2] *Siddiqi* was originally filed in the Central District of California, but transferred after the Court *sua sponte* issued an Order to Show Cause.

[3] Walker is a citizen of Alabama. Walker Compl. ¶ 15.

- New Jersey Consumer Fraud Act (*Rudich, Siddiqi, Thomas, Alvarez, Hawkins, Dourdoulakis, Walker, Burns, Gray, Ginger*)

In addition, *Rudich*, *Dourdoulakis*, and *Walker* bring warranty and unjust enrichment claims, and *Dourdoulakis* additional claims for declaratory relief and under the Magnuson-Moss Act. Every action prays for similar relief including restitution, damages and injunction.

ARGUMENT

I. THESE ACTIONS AND ANY TAG-ALONG ACTIONS ARE APPROPRIATE FOR TRANSFER AND CONSOLIDATION PURSUANT TO 28 U.S.C. §1407(a)

This panel may centralize two or more civil cases for coordinated pretrial proceedings upon a determination that (1) the cases "involv[e] one or more common questions of fact," (2) the transfers would further "the convenience of parties and witnesses," and (3) the transfers "will promote the just and efficient conduct of [the] actions." 28 U.S.C. § 1407(a). The purpose of centralization is to "eliminate duplication in discovery, avoid conflicting rulings and schedules, reduce litigation cost, and save the time and effort of the parties, the attorneys, the witnesses, and the courts." MANUAL FOR COMPLEX LITIGATION, §20.131 (4th ed. 2010). The pending cases meet these criteria and should be transferred and consolidated for pretrial proceedings.

A. The Actions Involve One or More Common Questions of Fact.

The ten pending actions are based upon nearly identical facts concerning identical conduct by Defendants. With some minor variations, each action concerns the same defendants, same products, same alleged misrepresentations concerning the purported immunity and digestive health benefits of probiotics and DHA/AHA, and same proposed classes. Accordingly, the first prong of § 1407(a) is satisfied. *See In re Enfamil Lipil Mktg. & Sales Practices Litig.*, 764 F. Supp. 2d 1356, 1357 (J.P.M.L. 2011) (centralizing six actions that "involve common factual questions arising from the marketing and advertising of the infant formula Enfamil

LIPIL" and which "particularly focus upon Mead's representations concerning the presence and/or efficacy of two nutrients found in breast milk that are known to promote brain and eye development in infants, docosahexaenoic acid and arachidonic acid, which are contained in Enfamil LIPIL").

B. Consolidation Will Further the Convenience of the Parties and the Witnesses.

The proposed transfer and consolidation is necessary "for the convenience of parties and witnesses." 28 U.S.C. §1407(a). The plaintiffs in the actions will require depositions of the same persons and discovery of the same documents. Without consolidation, Defendants and third parties will be subjected to numerous duplicative discovery demands, and witnesses would face multiple, redundant depositions. Consolidation will mitigate these problems by enabling a single judge to manage discovery and minimize witness inconvenience and overall expense.

The savings in time and expense will benefit both the litigants and affected third parties. *See, e.g., In re Cuisinart Food Processor Antitrust Litig.*, 506 F. Supp. 651, 655 (J.P.M.L. 1981) (transfer and consolidation would "effectuate a significant overall savings of cost and a minimum of inconvenience to all concerned with the pretrial activities"); *In re Uranium Indus. Antitrust Litig.*, 458 F. Supp. 1223, 1230 (J.P.M.L. 1978) ("[Plaintiffs] will have to depose many of the same witnesses, examine many of the same documents, and make many similar pretrial motions in order to prove their . . . allegations. The benefits of having a single judge supervise this pretrial activity are obvious."); *In re Stirling Homex Corp. Sec. Litig.*, 405 F. Supp. 314, 316 (J.P.M.L. 1975) ("[W]e are confident that Section 1407 treatment will allow the . . . plaintiffs to experience a net savings of time, effort and expenses through pooling their resources with other plaintiffs . . . who share similar interests."). Given the similarity of the salient issues of fact in the

complaints, it will be decidedly more convenient for both the parties and the witnesses to have the cases consolidated in one forum.

C. Consolidation Will Promote the Just and Efficient Conduct of These Actions.

The proposed transfer and consolidation will also "promote the just and efficient conduct" of these actions in several ways. 28 U.S.C. §1407(a).

1. Consolidation Will Prevent Duplicative Discovery and Conflicting Pretrial Rulings.

All ten complaints contain substantially identical factual allegations. Where "analysis of the record . . . reveals a commonality of factual questions," consolidation "is necessary in order to prevent duplication of discovery, eliminate the possibility of conflicting pretrial rulings, and conserve the time and effort of the parties, the witnesses and the judiciary." *In re Food Fair Sec. Litig.*, 465 F. Supp. 1301, 1304 (J.P.M.L. 1979); *see also In re TMJ Implants Prods. Liab. Litig.*, 844 F. Supp. 1553, 1554 (J.P.M.L. 1994) (centralization "necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings (especially with respect to class certifications and summary judgments), and conserve the resources of the parties, their counsel and the judiciary").

In light of the likely duplication of discovery without consolidation, many of the same pretrial disputes are likely to arise in each of the ten cases. For example, each case is likely to involve issues concerning the nature and scope of discovery and issues of privilege. Moreover, given that the complaints are almost identical in their causes of action, if Defendants seek to dismiss claims in one action, they are likely to do so in all seven cases, relying on identical arguments. Thus, consolidation is necessary to prevent inconsistent pretrial rulings regarding these various pivotal issues. *See In re Multi-Piece Rim Prods. Liab. Litig.*, 464 F. Supp. 969, 974

(J.P.M.L. 1979) (centralization necessary "to prevent duplication of discovery and eliminate the possibility of conflicting pretrial rulings concerning these common factual issues").

These actions are particularly appropriate for consolidation because the plaintiffs seek certification of essentially identical classes. For this reason, the arguments both for and against certification are likely to be similar, if not entirely the same. Without consolidation, there is a possibility of inconsistent rulings on class certification and other class action-related issues. Under these circumstances, consolidation is particularly appropriate; the Panel has "consistently held that transfer of actions under Section 1407 is appropriate, if not necessary, where the possibility of inconsistent class determinations exists." *In re Sugar Indus. Antitrust Litig.*, 395 F. Supp. 1271, 1273 (J.P.M.L. 1975); *see also In re Maytag Corp. Neptune Washer Prods. Liab. Litig.*, 333 F. Supp. 2d 1382, 1383 (J.P.M.L. 2004) ("Centralization under Section 1407 is necessary in order to . . . prevent inconsistent pretrial rulings (especially with respect to jurisdictional and class certification matters)"); *In re Eastern Airlines, Inc. Flight Attendant Weight Program Litig.*, 391 F. Supp. 763, 764 (J.P.M.L. 1975) ("the need to insure uniform disposition of the competing requests for class designations presents a compelling reason for supervision of these actions in a single district"); *In re Roadway Exp., Inc. Employment Practices Litig.*, 384 F. Supp. 612, 613 (J.P.M.L. 1974) ("the existence of and the need to eliminate [the possibility of inconsistent class designations] presents a highly persuasive reason favoring transfer under Section 1407").

2. These Actions are Sufficiently Numerous and Complex to Warrant Consolidation.

The ten cases here are sufficiently numerous and complex to warrant consolidation. In other instances, the Panel has ordered transfer and consolidation even if there are as few as two cases if, as here, the issues involved are sufficiently complex and consolidation would prevent

the duplication of discovery and pretrial rulings,. *See, e.g.*, *In re First Nat'l Bank, Heavener, Okla. (First Mortg. Revenue Bonds) Sec. Litig.*, 451 F. Supp. 995, 997 (J.P.M.L. 1978) (centralization was "necessary, even though only two actions are involved, in order to prevent duplicative pretrial proceedings and eliminate the possibility of inconsistent pretrial rulings"); *In re Edward H. Okun I.R.S. §1031 Tax Deferred Exchange Litig.*, 609 F. Supp. 2d 1380 (J.P.M.L. 2009) (centralizing two actions); *In re Payless ShoeSource, Inc., Calif. Song-Beverly Credit Card Act Litig.*, 609 F. Supp. 2d 1372 (J.P.M.L. 2009) (same); *In re Aetna, Inc. Out-of-Network "UCR" Rates Litig.*, 609 F. Supp. 2d 1370 (J.P.M.L. 2009) (same). These cases will particularly involve the complexities of expert analysis with respect to the scientific evidence supporting or refuting Defendants' probiotic, immunity, digestive health, and DHA/AHA claims.

II. THE EASTERN DISTRICT OF WASHINGTON IS THE BEST VENUE IN WHICH TO CENTRALIZE THE CASES

Section 1407(a) provides that "transfers for [coordinated] proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). The Eastern District of Washington is the superior venue for the transfer and consolidation of these actions because it serves the convenience of all parties and is best situated for the just and expedient resolution of the actions. Alternatively, the Southern District of California would be an appropriate transferee forum.

A. The Geographic Location of the Northern District of California Serves the Convenience of the Interested Parties and Witnesses.

The location of the *Burns* action is also the ideal transferee district because it is conveniently located on the West Coast within a reasonable distance of the majority of the

plaintiffs, their counsel, and Defendants' counsel.[4] Hawkins Compl. ¶ 5; Alvarez Compl. ¶ 5; Burns Compl. ¶ 5; Thomas Compl. ¶ 6, Gray Compl. ¶ 7.

Moreover, as noted in the *Walker* Complaint, it was Nestle who, even before purchasing Gerber, "introduced the first infant formulas containing probiotics in the United States." Walker Compl. ¶ 25 (replicating press release issued out of Glendale, California containing many of the claims that are at issue in these actions). Nestle's principal place of business is in California. *See, e.g.*, Dourdoulakis Compl. ¶ 11. Accordingly, many relevant witnesses and documents that will be the subject of pretrial proceedings are likely located on the West Coast.

Although defendant Gerber maintains offices in New Jersey, that office's overall role vis-à-vis Gerber's Michigan offices and Nestle's California offices is, as yet, unclear. For example, while Gerber's New Jersey address appears on the labels of some products, its Michigan address appears on others. *See* Burns. Comp. Ex. 1 at 13:

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[4] *See In re Anthracite Coal Antitrust Litig.*, 436 F. Supp. 402, 403 (J.P.M.L. 1977) (where inconvenience of counsel would impinge on convenience of parties or witnesses, Panel may consider factor in decision to transfer).

B. The Relative Caseloads of the Potential Transferee Districts and Judges Favors Centralization in the Eastern District of Washington.

The Panel often considers potential transferee courts' relative caseload statistics in determining where to centralize proceedings. *See, e.g.*, *In re Xybernaut Corp. Sect. Litig.*, 403 F. Supp. 2d 1354, 1355 (J.P.M.L. 2005); *In re Veeco Instruments Inc. Sec. Litig.*, 387 F. Supp. 2d 1365, 1366 (J.P.M.L. 2005). Here, according to the latest statistics maintained on the JPML's webpage[5], of the six districts in which cases subject to this motion are currently pending, the relative caseloads for MDLs are as follows (in ascending order):

[5]http://www.jpml.uscourts.gov/sites/jpml/files/Pending%20MDL%20Dockets_By%20District_May-2012.pdf.

Eastern District of Washington – 0 Litigations / 7 Judges (0 litigations per Judge)

Eastern District of California – 0 Litigations, 10 Judge (0 litigations per Judge)

District of New Jersey – 14 Litigations / 23 Judges (0.61 litigations per Judge)

Southern District of California – 10 Litigations, 16 Judges (0.625 litigations per Judge)

Northern District of California – 21 Litigations / 20 Judges (1.05 litigations per Judge)

Accordingly, the Eastern District of Washington (and the Eastern District of California), are currently the least burdened with pending MDLs. Similarly, the most recent available statistics maintained by the Federal Judiciary[6] show the following Median Time From Filing to Trial (Civil) (in ascending order):

Eastern District of Washington – 23.2 months

Northern District of California – 34.3 months

Southern District of California – 35.1 months

Eastern District of California – 43.6 Months

District of New Jersey – 43.6 months

Moreover, of all the judges before whom these cases are pending (e.g., Judges Anderson, Anello, Shea, Koh and Linares), only two Judge currently has an MDL—the District of New Jersey's Honorable Jose L. Linares (MDL No. 1730, *In re Hypodermic Prods. Antitrust Litigation*), and the Northern District of California's Honorable Lucy Koh (MDL No. 2250, *In re iPhone/iPad Application Consumer Privacy Litigation*).

In sum, the Eastern District of Washington is the most appropriate transferee district for the following reasons: (1) it is the near the location of Defendant Nestle USA, Inc.; (2) it is conveniently located on the West Coast, where six plaintiffs reside, eight plaintiffs' counsel

[6] *See* http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx.

reside and work, and Defendants' counsel resides and works; (3) it has the smallest MDL caseload among the districts in which these actions have been filed; (4) and it has the shortest median time from filing to trial of all the courts in which these actions are pending.

Alternatively, Movants believe the Southern District of California would be an appropriate transferee court for similar reasons, e.g., based on its relatively small caseload, the concentration of these actions and parties on the West Coast, and the lack of any currently-pending MDLs before Judge Anello.

CONCLUSION

For the foregoing reasons, Movant Ryan Burns respectfully requests that the Panel order centralization of the actions listed in the attached Schedule of Actions, plus any future tag-along actions, to the Eastern District of Washington, or alternatively to the Southern District of California, for coordination of pretrial proceedings pursuant to 28 U.S.C. §1407.

Dated: July 6, 2012

Respectfully Submitted,

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